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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACQUELINE DUPONT CARLSON et al.,

Plaintiffs and Respondents,

v.

PATRICE GILGAN,

Defendant and Appellant.

G055355

(Super. Ct. No. 30-2016-00881906)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed in part and reversed in part.

Freedman & Taitelman, Jesse A. Kaplan and Adam N. Pugatch for Defendant and Appellant.

The Law Offices of Nigel Burns, Nigel Burns and Brandon L. Wyman for Plaintiffs and Respondents.

* * *

Plaintiff Jacqueline Dupont Carlson owns plaintiff Dupont Residential Care, Inc., doing business as Irvine Cottages Memory Care (Irvine Cottages), a residential care facility. Defendant Patrice Gilgan's father (Gerald) briefly stayed at Irvine Cottages, where he suffered a fall. Afterward, Gilgan began publicly campaigning against perceived neglect at Irvine Cottages. Among other things, she was interviewed for a television talk show and posted three videos with commentary on a Web site called LiveLeak.

Carlson and Irvine Cottages sued Gilgan for defamation and related causes of action. Gilgan responded to plaintiffs' complaint with an anti-SLAPP special motion to strike (Code Civ. Proc., § 425.16), which the court granted in part. The court determined the complaint arose out of protected activity, but that claims arising from the first two videos were time-barred. As to the third video, however, the court determined plaintiffs' claims were timely and presented a prima facie case. Thus, the court granted Gilgan's anti-SLAPP motion with respect to claims arising from the first two videos, but denied her motion with respect to claims arising from the third video.

Gilgan appeals, contending the court should have granted the anti-SLAPP motion in full. In particular, she contends plaintiffs could not establish a prima facie case because they were bound by certain findings of the California Department of Social Services, Community Care Licensing Division (CCLD) under principles of collateral estoppel. We conclude that doctrine does not apply. Gilgan also contends the expert declaration plaintiffs relied upon was inadmissible, and thus plaintiffs could not establish a prima facie case. We conclude that, even excluding inadmissible evidence, there remained sufficient admissible evidence to support Irvine Cottages prima facie case of defamation.

Gilgan also argues that even if the motion should not have been granted in full as to Irvine Cottages, it nevertheless should have been granted in full as to Carlson because the third video does not reference her, and a private plaintiff must show the statement refers to her explicitly or by clear implication. We agree Carlson did not meet this requirement. We also agree with Gilgan's contention that plaintiffs failed to meet the elements of their economic interference claims. Accordingly, we will affirm in part and reverse in part by remanding with directions to dismiss the complaint as to Carlson, and to strike Irvine Cottages' economic interference claims (the third and fourth causes of action of plaintiffs' complaint).

FACTS

In an appeal from an anti-SLAPP motion, we "'accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) The evidence so construed reveals the following facts.

In early 2013, Gerald underwent a brain surgery and, afterward, moved into Irvine Cottages, a residential care facility specializing in memory-impaired patients. Irvine Cottages is a board and care facility, not a medical facility. It employs a single doctor who visits once or twice per month, which is the industry standard practice. The doctor was not scheduled to be present at any time during Gerald's five-day residency. Gilgan and her mother hired a hospice service to provide one-on-one care for her father.

When Gerald was discharged from the hospital, he was on multiple medications, including Norco, Seroquel, and Depakote for pain and agitation, prescribed by a doctor at the hospital. A licensed vocational nurse (LVN) from the hospice service prescribed Haldol.

Gerald stayed at Irvine Cottages for five days in February 2013. With the exception of his final day there, the hospice service administered all of his medications. On the sole occasion that an employee of Irvine Cottages administered medication to Gerald, it was at the express direction of a hospice LVN. Carlson and other staff members at Irvine Cottages have personally reaffirmed this to Gilgan.

According to Gilgan, her father was alert and talkative before entering Irvine Cottages, but quickly became withdrawn, lethargic, and sedentary. Gilgan described him as being in a comatose and vegetative state. She declared that his condition grew worse as he stayed at Irvine Cottages.

On February 22, 2013, Gilgan decided to stop 24-hour one-on-one care through the hospice, instead reducing the service to checking on him two to three times per week. That night, Gerald sustained a fall. He gashed his head, but otherwise suffered no injury. Irvine Cottages staff did not discover that he had fallen until they checked on him at 6:46 a.m. The staff had last checked on him at midnight. He must have fallen sometime during that timeframe, but there is no evidence as to the exact time of his fall.

When Irvine Cottages staff discovered Gerald on the ground, they did not call 911 immediately. Instead, they called the hospice service seeking direction. The hospice service did not answer the call, so the Irvine Cottages staff left a message. And then two more. The hospice service finally returned the call at 7:00 a.m. and instructed the staff to call 911, which they did. The paramedics came and helped Gerald back onto the bed but did not take him to the hospital. All told, Gerald was on the ground for 29 minutes from when he was first discovered until the paramedics helped him back into bed.

Irvine Cottages staff called Gilgan, who arrived in the afternoon. Gilgan observed her father to have a large gash on his forehead. He was catatonic, extremely pale, completely non-responsive and unconscious. She could not wake him. As a result, she called 911 and her father was taken to the hospital, where he stayed for two and a half

weeks. The record does not disclose what happened afterward, or where her father stayed, though it was not at Irvine Cottages. He ultimately passed away in September 2013. The record is silent as to his cause of death.

In April 2013, Gilgan initiated a formal complaint against Irvine Cottages before the CCLD. After an investigation, CCLD substantiated three violations in connection with Gerald. First, it found Irvine Cottages' failure to call 911 promptly was a violation. CCLD concluded that when the hospice service did not return the phone call within a reasonable time, Irvine Cottages staff should have called 911 on their own. Second, CCLD found that a hospice LVN had administered Haldol after 5 hours 15 minutes hours instead of 6, as prescribed.[1] CCLD concluded, "The facility staff failed to read the progress notes written by the LVN." "Had the facility read the hospice progress notes, the facility administration would have brought up the over medication problem to the hospice agency." Third, given Gerald's needs, the investigator found Irvine Cottages should have increased its staff.

The report also noted that an Irvine Cottages staff member administered a single dose of Norco to Gerald on the hospice agency's instruction. Norco had not been prescribed, and thus the staff should have contacted the physician before administering the medication. For reasons that are not clear in the record, this incident was not deemed a violation. Irvine Cottages did not appeal the findings of the investigation, but instead took corrective actions.

In 2015, in connection with Gilgan's "potential elder abuse and wrongful death claim against Irvine Cottages," Gilgan obtained surveillance footage of her father's stay there. Gilgan was "horrified by what [she] saw, in particular footage of [her] father being abused."

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[1] The CCLD report states that the Haldol had been administered at 2030 hours and again at 0115 hours, a difference of 4 hours 45 minutes, not 5 hours 15 minutes, an apparent arithmetic error.

According to Gilgan, "by 2015, I had become an elder abuse awareness advocate and became affiliated with anti-elder abuse organizations." She also became a professional investigator and would investigate elder abuse at "various facilities in Southern California."

In February 2015, Gilgan filed another complaint against Irvine Cottages with CCLD, based on video footage showing a staff member placing a dirty towel over Gerald's face during his stay there. CCLD substantiated the complaint, though no corrective action was necessary because the particular staff member no longer worked at Irvine Cottages.

Around this same time, a television program called America Tonight contacted Gilgan in connection with an investigation it was doing into elder abuse at assisted living facilities. Gilgan was ultimately interviewed by the journalist leading the investigation concerning her father's treatment, and parts of the interview were aired on the program. The program also aired some of the surveillance footage from Gerald's stay at Irvine Cottages.

Beginning in May 2015, Gilgan began posting videos concerning her father's treatment on the Web site called LiveLeak. On May 24, 2015, she posted two videos.

The first was the America Tonight segment, together with certain written comments, which she entitled "Elder Abuse Orange County, California" (video 1). The written caption to the video stated, "Gerald Gilgan had Dementia. After 5 days of being at this Board and Care he was drugged. 2 facility [*sic*] were involved. The first one was Irvine Cottages in Mission Viejo, Ca. Gerald received antipsychotics by a doctor who never saw him. Irvine Cottages made the family believe he was sleeping all the time because of his disease. On the 5th day, Gerald fell and had lain on the floor for 8-12 hours. Once the staff noticed him, they never called 911 until later. They took pictures instead. Gerald was treated dreadfully. Gerald was admitted to the hospital. Gerald was

in a drug induce[d] haze for 2.5 weeks. After his release, Gerald went to Villa Valencia skilled nursing facility. Villa Valencia Skilled Nursing facility did the same exact thing to Gerald within 5 days. Gerald's death was hastened due to the massive drugging. Don't let this happen to your loved one."

The second video appeared on the LiveLeak Web site under the title, "Elder Abuse, Orange County, CA Dr. Jacqueline Dupont owner," and contains the following written caption: "Drugging Dementia, This patient was given antipsychotics drugs without ever seeing a doctor at Irvine Cottages. These drugs are not approved by the FDA. Profits over People. Low staffing. Gerald's death was hasten [sic] due to the massive over drugging. Owners of this facilities need to be criminally charge[d], and held accountable." The video was a homemade compilation of video segments from phone cameras on the first day of Gerald's stay at Irvine Cottages, followed by segments from the surveillance footage showing her father in a lethargic state. Toward the end of the video the following text appears: "No Chemical Restraints" and "LETS PUT AN END TO ELDER ABUSE."

Gilgan posted the third video on March 14, 2016. It appeared on the LiveLeak Web site under the title, "Chemical Restrains on Elderly Irvine Cottages Memory Care" (video 3). The written caption stated, "Gerald's death was hastened due to elder abuse. Know the signs of elder . . . abuse." Video 3 is a compilation of photographs of Gerald showcasing his life, followed by segments of the surveillance footage. At various points throughout the video, the following text appears: "Chemical restraints kill"; "GERALD WAS GIVEN ANTIPSYCHOTIC DRUGS OVER THE COURSE OF 5 DAYS WHICH HASTENED GERALD'S DEATH"; "WHEN GERALD LEFT THE HOSPITAL AFTER BRAIN SURGERY HE WENT INTO IRVINE COTTAGES"; "GERALD HAD DEMENTIA, BUT WAS IN GOOD SPIRITS AND LUCID WHEN HE ARRIVED. WITHIN HOURS OF HIS ARRIVAL RECORDS SHOW GERALD BEGAN RECEIVING THE POWERFUL ANTIPSYCHOTIC

MEDICATIONS HALDOL AND SEROQUEL"; "HALDOL IS NOT APPROVED BY THE FDA FOR THE TREATMENT IN OLDER ADULTS WITH DEMENTIA"; "Sorry Dad, I promise Justice will be served"; and "Let's put an[] End to Elder Abuse. This is not just my Father's world, This is OUR WORLD."

Carlson and Irvine Cottages filed suit against Gilgan on October 18, 2016, asserting causes of action for (1) Defamation Per Se; (2) False Light; (3) Intentional Interference with Prospective Economic Relations; (4) Negligent Interference with Prospective Economic Relations (together, the economic interference claims); (5) Injunctive Relief; and (6) Declaratory Relief. The gist of the complaint was that Gilgan had made various defamatory statements about defendants, despite knowing that the alleged mistreatment her father received was at the hands of the hospice service, not defendants.

Gilgan answered the complaint and, shortly afterward, filed an anti-SLAPP motion. The court granted the motion in part. It found that the causes of action arose out of Gilgan's exercise of her right to free speech, and that, as to videos 1 and 2, plaintiffs could not demonstrate a probability of prevailing because the defamation and related causes of action were time barred. (See Code Civ. Proc., § 340.1, subd. (c) (one-year statute of limitations).) As to video 3, however, the court concluded plaintiffs' claim was not time barred, and that the testimony of Carlson and her expert (more on her below) established a probability of success. Accordingly, the court denied the motion as to video 3. Gilgan appealed. Plaintiffs did not.

DISCUSSION

The gist of this case is defamation, and thus it is vital at the outset to determine exactly what was communicated in video 3. To that end, "we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn

from the communication. [Citation.] . . . [Citation.] In this connection the expression used as well as the 'whole scope and apparent object of the writer' must be considered. [Citation.]" (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 803.) The assumption underlying much of Gilgan's brief is that the defamatory statement is, essentially: "Irvine Cottages committed elder abuse." Undoubtedly, video 3 conveys that message, but it conveys more than that. At minimum, it conveys the specific messages that Irvine Cottages overmedicated Gerald with antipsychotic drugs for the purposes of sedating him ("chemical restraint"), and that Irvine Cottages contributed to his premature death. Against this backdrop, we consider whether the court erred in partially denying Gilgan's anti-SLAPP motion.

"In evaluating an anti-SLAPP motion, the court conducts a potentially two-step inquiry. [Citation.] First, the court must decide whether the defendant has made a threshold showing that the plaintiff's claim *arises from* protected activity. [Citation.] To meet its burden under the first prong of the anti-SLAPP test, the defendant must demonstrate that its act underlying the plaintiff's claim fits one of the categories spelled out in subdivision (e) of the anti-SLAPP statute." (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 859, review granted Nov. 1, 2017, S244148.) "Second—*if* the defendant meets its burden of showing all or part of its activity was protected—then the court proceeds to the next step of the inquiry. At this stage—applying the second prong of the anti-SLAPP test—the court asks 'whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] [¶] An appellate court reviews a trial court's ruling on an anti-SLAPP motion de novo, applying the legal principles and two-prong test discussed above." (*Id.* at pp. 859–860.)

Here, we are concerned only with the second prong. The court found the causes of action arose out of Gilgan's protected speech, and plaintiffs do not challenge that finding on appeal. Accordingly, we must determine whether plaintiffs proffered

evidence giving rise to a probability of prevailing on their causes of action, beginning with their defamation claim.

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) Additionally, in order to avoid impinging on the First Amendment, our high court has held that the speaker must have acted negligently where the plaintiff is a private figure. (*Khawar v. Globe Internat. Inc.* (1998) 19 Cal.4th 254, 274.) Defamation can take the form of either libel or slander. (Civ. Code, § 44.) Libel is written or depicted defamation. (Civ. Code, § 45.) Slander is verbal defamation. (Civ. Code, § 46.)

Broadly speaking, Gilgan levels three main lines of attack against the court's order. First, Gilgan contends CCLD's investigative findings are binding on plaintiffs and establish the truth of her claims as a matter of law. "Truth is a complete defense to a defamation claim." (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 293.) Second, Gilgan contends the principal evidence plaintiffs relied upon to establish the falsity of her claims—their expert's testimony—was inadmissible. Third, Gilgan contends video 3 was not about Carlson at all and thus she had no claim for defamation. We consider each argument in turn.

The CCLD Investigative Findings are Not Binding

Gilgan contends CCLD's investigative findings are binding on plaintiffs because they were given an opportunity to appeal, but chose not to. Gilgan relies on a doctrine called judicial exhaustion, which is related to collateral estoppel. "[J]udicial exhaustion 'may arise when a party initiates and takes to decision an administrative process—whether or not the party was required, as a matter of *administrative* exhaustion, to even begin the administrative process in the first place. Once a decision has been issued, provided that decision is of a sufficiently judicial character to support

collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. [Citation.] Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims.'" (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 (*Murray*).) In other words, once a party starts a quasi-judicial administrative process, it must be seen to completion. Failure to complete the process may result in collateral estoppel.

In *Murray* the plaintiff initiated an administrative whistleblower complaint with the United States Secretary of Labor (Secretary). The Secretary investigated, during which the employer submitted a written response to the complaint, produced relevant documentation, and offered testimonial evidence. The plaintiff, however, did not participate. (*Murray, supra*, 50 Cal.4th at p. 865.) The Secretary made findings adverse to the plaintiff. (*Id.* at pp. 865-866.) The Secretary communicated those findings in a letter that advised the plaintiff he had 30 days to appeal the findings before an administrative law judge, and that if he failed to do so, "this decision shall become final and not subject to judicial review." (*Id.* at p. 866.) The plaintiff did not appeal. Instead, he filed a lawsuit. (*Ibid.*)

Our high court in *Murray* concluded the doctrine of judicial exhaustion barred the complaint. It recognized the case represented "a variation" on the usual fact pattern, where the abandoned appeal is from a hearing that itself was of a quasi-judicial nature. (*Murray, supra*, 50 Cal.4th at p. 868.) Instead, the administrative action was simply an investigation, but the plaintiff forfeited a quasi-judicial administrative appeal. Nevertheless, "'the inquiry that must be made is whether the traditional requirements and policy reasons for applying the collateral estoppel doctrine have been satisfied by the particular circumstances of this case.'" (*Ibid.*) The factors that led the court to apply the doctrine there were that: (1) the plaintiff initiated the administrative investigation (*id.* at

p. 869); (2) the appeal would have afforded the plaintiff "an absolute right to a full de novo trial-like hearing before an [administrative law judge], a hearing [the court found] would fully comport with the requirements . . . for establishing that the administrative proceedings were 'undertaken in a judicial capacity'" (*id.* at p. 868); (3) he was explicitly warned that failure to appeal would render the findings binding and not subject to judicial review (*ibid.*); and (4) the investigation concerned the exact issue to be decided in the lawsuit (*ibid.*).

None of these factors are present here.

First, Irvine Cottages did not instigate the investigation. To the contrary, it started as an unannounced visit by an investigator. The *Murray* court placed special emphasis on this factor, noting, "Focusing the inquiry on the *opportunity to litigate* issues in the prior administrative proceeding is particularly appropriate where the party who initiates an administrative complaint apparently abandons his action upon receiving an adverse ruling, thereby forfeiting his statutory rights to a formal de novo hearing of record before an [administrative law judge], and then seeks to relitigate the same issues decided in the agency's final order against the same party in a subsequently filed court action." (*Murray*, 50 Cal.4th at p. 869.) The converse is that applying the doctrine is less appropriate where, as here, Irvine Cottages did not initiate the investigation, and the violations identified could be cheaply and easily corrected. If we were to hold judicial exhaustion applied, it would force businesses in Irvine Cottages' position to consider litigating issues as a prophylactic measure against the contingency of future litigation. Rather than saving litigation costs by avoiding duplicative litigation—a principal aim of collateral estoppel—we would be encouraging unnecessary administrative litigation. We see no compelling policy rationale for imposing that burden.

Second, it appears Irvine Cottages would not have been afforded a de novo trial before an administrative law judge if it had appealed.[2] According to form LIC 9058 from the California Department of Social Services, a licensee is entitled to an appeal before an administrative law judge only in the case of a civil penalty for death, serious injury, or physical abuse. None of the citations issued to Irvine Cottages are described as such. Irvine Cottages' appeal, therefore, would have been to a regional manager, and then a program administrator, and the procedures for those appeals are not in the record. Accordingly, there is nothing to suggest the proceeding was of a sufficiently judicial character to invoke collateral estoppel.

Third, there is nothing in the record indicating Irvine Cottages was warned that a failure to appeal would render the findings immune to judicial review.

Fourth, the investigator's findings are not conclusive on the issues in this appeal. Gilgan apparently initiated the complaint against Irvine Cottages making four separate allegations, including that her father "was over medicated and sedated so staff don't [*sic*] need to provide care and supervision to the resident." This allegation closely tracks the statement in video 3 that Irvine Cottages used "chemical restraints." However, the investigator did not sustain that allegation as such. The closest the investigator got was citing Irvine Cottages for failing to monitor the hospice agency's administration of drugs when one dose was administered less than an hour early. The investigator also faulted Irvine Cottages for administering a single dose of Norco on the hospice agency's instruction where a doctor had not prescribed it. As far as we can determine on the present record, Irvine Cottages' fault, according to the investigator, was not questioning the hospice agency enough. But the drugs were mostly administered by, and always directed by, the hospice agency. This important distinction is completely omitted from video 3. Even if we were to apply collateral estoppel, therefore, we would not find that

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[2] Gilgan's motion for judicial notice filed on January 26, 2018 is granted. We take judicial notice of form LIC 9058.

the investigator's findings were dispositive of the actual issue in this proceeding. Accordingly, the court did not err in refusing to accord the investigator's findings preclusive effect.

Plaintiffs' Evidence Was Sufficient

Next, Gilgan contends plaintiffs' evidence was insufficient to establish the elements of defamation. Plaintiffs' evidence came in the form of a declaration from Carlson and another from an expert nursing home administrator, Cyndy Minnery.

Minnery opined as follows: It is common industry practice for medications to be prescribed by the discharging hospital doctors or registered nurses from the hospice care provider. It is standard industry practice for the hospice care provider to discuss the medications to be administered with family members. It is not common industry practice for residential care staff to prescribe medication for a resident; rather, the industry standard is for residential care staff to follow the direction of the hospice care provider. She opined, based on the records of medication administered, Gerald was not overmedicated. Although the CCLD investigator had faulted Irvine Cottages for not supervising the hospice care provider, who provided two doses of Haldol (an antipsychotic drug) within 5 hours 15 minutes of each other,[3] Minnery opined this was within the standard of care because there was less than one hour until the next scheduled dosage, and also because he was only given half of the standard dose in both instances (1mg verses 2 mg). Further, when Irvine Cottages administered a single dose of Norco, this was within the standard of care because the hospice LVN's directed them to do it, and Gerald had received Norco four days earlier from a doctor. "Based on my experience, review of records and discussions with Irvine Cottages administrators, there is no evidence that Mr. Gilgan was overmedicated at any time." Regarding Gerald's fall

[3] Or possibly 4 hours 45 minutes, see footnote 1, *ante*.

from bed, elder care facilities are instructed to call hospice care rather than 911 in case of non-catastrophic emergencies, such as falling from bed, and Irvine Cottages acted within industry standards in doing so.

Carlson declared that Irvine Cottages had no involvement in the decision of what drugs Gerald would receive, or how often he would receive them. Carlson confirmed that, other than the single medication mentioned above, Irvine Cottages staff did not administer any drugs to Gerald. Importantly, Carlson declared Gilgan was aware of this, "as I and other staff of Irvine Cottages have personally reaffirmed this to them." "Ms. Patrice Gilgan [was] also fully aware at the time she made the above statements of all the drugs prescribed to her father Mr. Gilgan, and that St. Joseph Hospice and Mission Hospital doctors, not Irvine Cottages, was responsible for the prescribing of those drugs and decisions regarding administration of those drugs for Mr. Gilgan." Regarding Irvine Cottages being responsible for Gerald's death, Carlson declared, "This is a complete fabrication, considering Irvine Cottages was not responsible for the drugs prescribed or administered to Mr. Gilgan, and he passed away approximately two years thereafter."

Much of Gilgan's criticism of this evidence hinges on her very general interpretation of the statements in video 3. Her criticism was nonspecific, claiming only that Irvine Cottages abused Gerald in a general sense. She argues that the evidence overwhelmingly supports that general proposition. But as we pointed out above, while video 3 certainly makes that general criticism, it also makes the more specific allegations that Irvine Cottages employed "chemical restraints" and contributed to his death. Irvine Cottages may establish its defamation claim by producing evidence that those more specific claims are false. Gilgan's criticism also places heavy weight on the CCLD report establishing the truth of her statements, another line of attack we have already dealt with.

Gilgan's other line of attack on plaintiffs' evidence is that both the Minnery and Carlson declarations relied on medical records that were never offered into evidence,

and thus they either lacked foundation or were based on inadmissible hearsay. Gilgan raised these objections in the trial court, but the court overruled them.

Gilgan relies on *Garibay v. Hemmat* (2009) 161 Cal.App.4th 735. *Garibay* was a medical malpractice action in which the defendant doctor moved for summary judgment based solely on an expert declaration opining, based on a review of the relevant medical records, that the doctor had met the standard of care. The records were not admitted as part of the motion. (*Id.* at pp. 739-740.) The trial court granted summary judgment, but the court of appeal reversed, concluding the expert "had no personal knowledge of the underlying facts of the case, and attempted to testify to facts derived from medical and hospital records which were not properly before the court. Therefore his declaration of alleged facts had no evidentiary foundation. An expert's opinion based on assumptions of fact without evidentiary support has no evidentiary value." (*Id.* at p. 743.)

Gilgan's objections to the Minnery and Carlson declarations were well taken to the extent they relied on the medical records to establish that Gerald was not overmedicated. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 684 ["If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay."].) Nonetheless, we conclude there was sufficient admissible evidence in the record to make the "minimal merit" showing required to overcome the anti-SLAPP motion, and thus the court's error in admitting the testimony was harmless. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

Carlson declared, based on her personal knowledge of the operations of Irvine Cottages, that it did not prescribe any medications to Gerald, and all of the medications were administered by, or at the direction of, the hospice agency. Minnery confirmed that this is the industry standard. The CCLD investigation report, submitted by Gilgan and admitted without objection, provided specific details of the hospice LVN

administering the medications to Gerald, with the exception of a single dose of Norco administered by Irvine Cottages staff at the hospice LVN's direction. The combination of this evidence was sufficient to support a prima facie case that Gilgan's accusations of Irvine Cottages using chemical restraints and thereby contributing to Gerald's death were false.

Gilgan's next argues there was no substantial evidence that she acted negligently in making the statements found in video 3. She contends it is undisputed that in making these statements, she relied on the CCLD reports. However, we have already observed that the CCLD reports do not support the blanket assertions of Irvine Cottages using chemical restraints, or in any way contributing to Gerald's death. Carlson testified that she and other Irvine Cottages staff repeatedly informed Gilgan that the hospice service was responsible for prescribing and administering drugs, not Irvine Cottages. Crediting this testimony, as we must, a jury could find that Gilgan acted negligently in attributing chemical restraints to Irvine Cottages.

The anti-SLAPP Motion Should Have Been Granted as to Carlson

Gilgan's next contention is that the motion should have been granted as to Carlson, even if not as to Irvine Cottages, because video 3 did not implicate Carlson. We agree.

Defamation, because it concerns speech, implicates First Amendment concerns. Various safeguards have been developed to properly balance society's interests in free speech with its interest in protecting reputations, including that the speech in question be *of and concerning* the plaintiff: "In defamation actions the First Amendment also requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff in some way." (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042 (*Blatty*).) "The 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are

the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt." ""'It is far better for the public welfare that some occasional consequential injury to an individual arising from general censure of his profession, his party, or his sect should go without remedy than that free discussion on the great questions of politics, or morals, or faith should be checked by the dread of embittered and boundless litigation.'"" (*Id.* at p. 1044.)

"Whether defamatory statements can reasonably be interpreted as referring to plaintiffs is a question of law for the court." (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 146.) "'Each case must stand on its own facts.'" (*Ibid.*)

Video 3 does not mention Carlson. In fact, it is not about her at all. Carlson's argument is that, because all three videos were published by the same user, a reasonable viewer could follow a link to the username and discover the other videos, one of which mentions her, ultimately deducing that Carlson is the owner of Irvine Cottages. But that connection—an investigation, followed by holding Carlson vicariously liable for the sins of her company—is too tenuous to satisfy the constitutional requirement that the statement reference Carlson "expressly or by clear implication." (*Blatty, supra*, 42 Cal.3d at p. 1044.) In our view, if so much investigation is required to connect video 3 to Carlson, it does not *clearly* implicate her. At best, it opaquely implicates her. Accordingly, Carlson did not establish a probability of prevailing on her defamation claim. Moreover, since all of her causes of action are based on video 3, and thus subject to the same constitutional limitation, Carlson's entire complaint should have been dismissed. (*See id.* at p. 1042 ["Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement"].)

Interference Claims and False Light

Gilgan contends Irvine Cottages failed to make a prima facie case for its interference claims. We agree. "Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 (*Slurry Seal*.) "The first element (hereafter the economic relationship element) has two parts: (1) an existing economic relationship that (2) contains the probability of an economic benefit to the plaintiff." (*Ibid.*) A claim for negligent interference entails similar elements, except that the conduct need only be negligent. (CACI No. 2204.)

Gilgan correctly observes that Irvine Cottages did not identify any third party with whom it had a relationship disrupted by Gilgan. Instead, Irvine Cottages presented evidence that in the time since Gilgan posted her videos, its revenue is down approximately 9.6 percent. This does not satisfy the elements of an interference claim. It is not enough to identify "'a class of as yet unknown [patrons].'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 330.) "'[T]he true source of the modern law on interference with prospective relations is the principle that tort liability exists for interference with *existing* contractual relations.'" (*Slurry Seal, supra*, 2 Cal.5th at p. 515.) A plaintiff must identify a specific, existing relationship with a reasonable expectation of future economic benefit.

Irvine Cottages essentially admits it did not establish an existing relationship, but contends that "[r]equiring Respondent to make a prima facie showing of an existing relationship in this context would amount to precluding all operators of board

and care facilities from bringing a claim for interference with prospective economic relationship."

Economic interference is not a general tort for all business losses. It is essentially an extension of interference with contract. If a board and care facility has a specific relationship that was disrupted, it can bring a claim. If it simply suffered general business losses not attributable to a specific third-party relationship, then economic interference is not the proper vehicle for its claim. Accordingly, the court should have stricken the economic interference claims, both intentional and negligent.

With regard to the false light cause of action, Gilgan contends it should have been stricken because it is superfluous with the defamation claim, and because corporations do not have privacy rights.

"'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.' [Citation.] 'A "false light" claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such.' [Citation.] '"A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice [where malice is required for the libel claim]."' [Citations.] Indeed, '[w]hen a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.'" (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264.)

Here, the false light claim is superfluous. However, Irvine Cottages correctly points out that, while this may expose it to a demurrer, it is not subject to being stricken in an anti-SLAPP motion: "Appellants first argue that [the] false light claim is 'surplusage' because the complaint also contains a specific cause of action for libel.

However, an anti-SLAPP motion is not the correct vehicle for asserting this position. Rather, this argument is properly the subject of a demurrer." (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 742.)

Gilgan's claim that Irvine Cottages does not have a privacy right has not been adequately briefed. Gilgan's argument is comprised of a single, short paragraph at the end of her brief, citing a 38-year old case that states, "there are no California cases recognizing that a corporation enjoys the right of privacy." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 878.) Regardless of whether that was true in 1980, it is no longer true: "'Although corporations have a lesser right to privacy than human beings and are not entitled to claim a right to privacy in terms of a fundamental right, some right to privacy exists. Privacy rights accorded artificial entities are not stagnant, but depend on the circumstances.'" (*Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260, 1287-1288.) Gilgan has not made any attempt to argue, under the circumstances of this case, why Irvine Cottages does not have a cognizable privacy right, and thus we need not address the issue; particularly since this cause of action is redundant with the properly substantiated defamation cause of action.

Plaintiffs Have Forfeited Their Assignments of Error

Plaintiffs spend the final seven pages of their *respondent's* brief arguing that the court erred in finding their claims based on video 1 and video 2 were time barred. "'As a general matter, "'a respondent who has not appealed from the judgment may not urge error on appeal.'" [Citation.] "To obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants.'" (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665.) Having failed to appeal, plaintiffs have forfeited their assignments of error.

DISPOSITION

The court's order partially denying Gilgan's anti-SLAPP motion is reversed as to Carlson and as to Irvine Cottages' economic interference claims. The cause is remanded with directions to dismiss the complaint as to plaintiff Jacqueline Dupont Carlson and to strike Irvine Cottage's third and fourth causes of action (intentional and negligent interference with prospective economic relations). In all other respects, the order is affirmed. The parties shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.